

OSCA/OCI'S FAMILY COURT CASE LAW UPDATE
April 2009

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Delinquency Case Law

Florida Supreme Court

A. T. v. State, __ So.2d __, 2009 WL 1011084 (Fla. 2009). **DISPOSITION QUASHED AND REMANDED FOR RECONSIDERATION PURSUANT TO E.A.R. V. STATE, __ SO.2D __, 2009 WL 217979 (FLA. 2009).** The Florida Supreme Court reviewed the Fourth District Court of Appeal's decision in A.T. v. State, 983 So.2d 679 (Fla. 4th DCA 2008). The Fourth District had cited its decision in E.A.R. v. State, 975 So.2d 610 (Fla. 4th DCA 2008) as authority. At the time, E.A.R. was pending review in the Florida Supreme Court. The Florida Supreme Court stayed the review of A.T. pending its disposition of E.A.R. Subsequently, the Florida Supreme Court in E.A.R. v. State, __ So.2d __, 2009 WL 217979 (Fla. 2009) quashed the decision and set forth the necessary analysis and findings when departing from the Department of Juvenile Justice's disposition recommendation pursuant to s. 985.433(7)(b), F.S. Accordingly, in the instant case, the Florida Supreme Court quashed and remanded the Fourth District's decision in A.T. for reconsideration under the Florida Supreme Court's subsequent decision in E.A.R. . <http://www.floridasupremecourt.org/decisions/2009/sc08-1159%20.pdf> (April 16, 2009).

First District Court of Appeal

S. B. v. State, __ So.2d __, 2009 WL 1010902 (Fla. 1st DCA 2009). **TRIAL COURT NOT AUTHORIZED TO CONTINUE SECURE DETENTION OF JUVENILES BEYOND THE 21-DAY STATUTORY TIME LIMIT REGARDLESS OF THE TRIAL COURT'S CONCLUSION THAT THE JUVENILE POSED A DANGER TO THE COMMUNITY.** The juvenile was charged in three separate petitions with felony offenses, which were in various procedural stages. After serving 21 days in detention, the juvenile was released. The juvenile then failed to appear for a consolidated hearing on the three offenses and was taken into custody. Following a detention hearing, the trial court placed the juvenile in secure detention for another 21 days. Twenty-one days later, at a review of the juvenile's detention status, the juvenile's counsel advised the court that the statutory time had expired and that the juvenile should be released. The trial court placed the juvenile in secure detention stating: "Based on the dangers to the community and danger to the children and danger to everybody else, I'm going to order him to stay in detention until another Court tells me otherwise." The juvenile then filed a petition for writ of habeas corpus. The First District Court of Appeal found that the State's power to detain juveniles charged with delinquent acts is entirely statutory in nature. Subject to exceptions not relevant in the instant case, s. 985.26(2), F.S. (2008), prohibits the detention of a juvenile for more than 21 days on the same offense unless an adjudicatory hearing for the case has been commenced in good faith by the court. Further, once a juvenile has been detained on an offense, that juvenile cannot be placed back into detention on the same charge prior to an adjudicatory hearing on that charge. The First District held that since the trial court had not commenced an adjudicatory hearing for any of the juvenile's cases, the trial court erred by holding the juvenile in secure detention beyond the statutory limit based on the circumstances of his offenses and the court's conclusion that the juvenile posed a danger to the community. Accordingly, the petition for writ of habeas corpus was granted.

<http://opinions.1dca.org/written/opinions2009/04-16-2009/09-1340.pdf> (April 16, 2009).

M.J.P. v. State, __ So.2d __, 2009 WL 981338 (Fla. 1st DCA 2009). **TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT DENIED THE JUVENILE’S REQUEST TO WITHDRAW HER UNCOUNSELED PLEA WHERE THE TRIAL COURT FAILED TO CONDUCT THE REQUIRED THOROUGH INQUIRY REGARDING THE WAIVER OF COUNSEL.** The First District Court of Appeal found that the trial court committed reversible error when it denied the juvenile’s request to withdraw her uncounseled plea of guilty on the ground that the trial court failed to conduct the required thorough inquiry regarding the waiver of counsel. Reversed and remanded with directions that the trial court permit the juvenile to withdraw her plea.

<http://opinions.1dca.org/written/opinions2009/04-14-2009/08-6046.pdf> (April 14, 2009).

S. T. v. State, __ So.2d __, 2009 WL 886308 (Fla. 1st DCA 2009). **DISPOSITION ORDER WAS A NULLITY WHERE THE DISPOSITION ORDER FAILED TO SPECIFY THE LENGTH OF THE JUVENILE’S TWO TERMS OF PROBATION, INCLUDING WHETHER THEY WERE TO BE SERVED CONSECUTIVELY OR CONCURRENTLY.** The juvenile’s disposition order failed to specify the length of the juvenile’s two terms of probation, including whether they were to be served consecutively or concurrently. The juvenile filed a motion to clarify the disposition order. The trial court failed to file its order ruling on the juvenile’s motion until more than thirty days after the motion was filed. Thus, the motion was deemed denied pursuant to Florida Rule of Juvenile Procedure 8.135(b)(2)(B) (2008). The First District Court of Appeal found that the juvenile was entitled to be informed of the length of her probation. Since the trial court failed to file its order ruling on the juvenile’s motion until more than thirty days after the motion was filed, the disposition order was a nullity. The disposition order was reversed and remanded for entry of a corrected disposition order. <http://opinions.1dca.org/written/opinions2009/04-03-2009/08-5093.pdf> (April 3, 2009).

Second District Court of Appeal

D.W.E. v. State, __ So.2d __, 2009 WL 1139284 (Fla. 2d DCA 2009). **RESTITUTION ORDER REVERSED WHERE DAMAGES WERE ONLY SUPPORTED BY HEARSAY TESTIMONY.** The juvenile appealed his restitution order. The trial court awarded restitution of \$1990, based in part, on the victim’s testimony about damage to a window. The victim stated, “Well, we had it just bolted shut and the gentleman estimated \$220 for it.” This testimony was admitted over a proper objection that the gentleman’s estimate was hearsay. The Second District Court of Appeal found that without this testimony, there was no evidence to support that element of the award of restitution. Accordingly, the Second District reversed the restitution award and remanded for a new restitution hearing. Affirmed in part, reversed in part, and remanded. http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2009/April/April%2029,%202009/2D08-891.pdf (April 29, 2009).

L.R.L. v. State, __ So.2d __, 2009 WL 1033757 (Fla. 2d DCA 2009). **RESTITUTION ORDER REVERSED BECAUSE THE STATE FAILED TO PRESENTED EVIDENCE THAT THE JUVENILE WAS EVER IN POSSESSION OF THE ITEMS MISSING FROM THE STOLEN TRUCK.** The juvenile appealed

the restitution order following his delinquency adjudication for grand theft of a motor vehicle. Juvenile challenged the \$2500 awarded for items that were inside the vehicle at the time it was stolen. A truck was stolen from the parking lot of a construction company. No one saw the theft, but several days later the juvenile was apprehended driving the stolen truck. The juvenile admitted that he knew the truck was stolen but denied that he was the one who stole it from the parking lot. At the restitution hearing, the victim testified about damage to the truck. The victim testified about items that were in the truck at the time it was stolen. The juvenile does not challenge the amounts awarded. Instead, the juvenile argued that the State failed to offer any evidence connecting him to the loss of these items. The Second District Court of Appeal found that there was no evidence that the loss of items inside the vehicle was caused directly or indirectly by the juvenile's offense, nor was there evidence that the loss was related to his criminal episode. The juvenile testified that the items were not in the truck when he received it. His grand theft conviction was based on his knowing possession of stolen property. The State introduced no evidence to show that the juvenile was the actual thief. The State presented no evidence that the juvenile was ever in possession of the items missing from the truck after it was recovered. Thus, the court erred in awarding \$2500 in restitution for these items. Affirmed in part, reversed in part, and remanded.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2009/April/April%2017,%202009/2D08-2418.pdf (April 17, 2009).

N.L. v. State, __ So.2d __, 2009 WL 839039 (Fla. 2d DCA 2009). **DISPOSITION ORDER REVERSED AND REMANDED FOR FAILURE TO COMPORT WITH THE ORAL PRONOUNCEMENT.** The juvenile challenged his adjudication and disposition for possession of cocaine and drug paraphernalia. The Second District Court of Appeal affirmed the adjudication without comment. However, the Second District found that the disposition order failed to comport with the oral pronouncement. The trial court placed the juvenile on probation on count one (possession of cocaine) for a term not to exceed his nineteenth birthday. On count two, (possession of drug paraphernalia), the trial court placed the juvenile on probation for no more than one year. The original written disposition order did not reflect the oral disposition imposed on count two. The juvenile filed a motion to correct and the trial court filed an amended disposition order. However, the amended disposition order reflected that the juvenile was placed on probation until his nineteenth birthday on both counts. The State conceded that the disposition order did not comport with the orally pronounced disposition. Accordingly, the Second District reversed and remanded for the limited purpose of correcting the amended disposition order. The Second District also noted that Florida Rule of Juvenile Procedure 8.947 provided a form order designating all the information such an order should include.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2009/April/April%2001,%202009/2D07-5738.pdf (April 1, 2009).

Third District Court of Appeal

D.A. v. State, __ So.2d __, 2009 WL 1139204 (Fla. 3d DCA 2009). **JUVENILE WAS NEITHER UNLAWFULLY DETAINED NOR IMPROPERLY INTERROGATED WHEN JUVENILE RESPONDED TO THE OFFICER THAT THERE WAS A BAGGY OF MARIJUANA IN THE VEHICLE FOLLOWING A TRAFFIC STOP PREDICATED ON AN EXPIRED TAG.** The juvenile appealed his adjudication for

possession of cannabis following a traffic stop predicated on an expired tag displayed on the vehicle he was driving. The juvenile argued that the officer who executed the stop was constitutionally obligated to release him immediately upon deciding not to issue him a citation for the expired tag, and that it was constitutionally improper to interrogate him about matters unrelated to the reason for the stop. The juvenile was stopped for displaying an expired tag. After checking the juvenile's license and the vehicle registration, it was determined that the tag was expired for only ten days. The officer decided not to issue a citation. The officer then asked if there was anything on the juvenile or in the vehicle that he needed to know about. The juvenile responded that there was a baggy of marijuana in the center console. The officer seized the bag of marijuana and arrested the juvenile. The Third District Court of Appeal held that the juvenile was neither unlawfully detained nor improperly interrogated, and affirmed the adjudication. <http://www.3dca.flcourts.org/Opinions/3D06-3122.pdf> (April 29, 2009).

K.H. v. State, __ So.2d __, 2009 WL 928498 (Fla. 3d DCA 2009). **EVIDENCE WAS LEGALLY INSUFFICIENT TO SUPPORT A FINDING OF BATTERY ON A LAW ENFORCEMENT OFFICER.** The juvenile appealed an order finding that he committed the offense of battery on a law enforcement officer. At about 11:00 P.M., two police officers were conducting drug surveillance in a residential neighborhood. The officers were parked in an unmarked pickup with dark tinted windows. The juvenile and a friend were walking home when they noticed the pickup parked on the swale with the engine running. The juvenile and his friend walked around the pickup, placed their hands on the windows, and looked inside. They did not try the door handles, did not try to break into the vehicle, and did not have anything in their hands. After a few minutes, one of the officers started to exit the vehicle. The juvenile started walking rapidly away on the sidewalk and his friend jumped a nearby fence and ran away. The officer turned the truck around to go after the juvenile's friend but was unable to find him. When the officer spotted the juvenile again, he got out of the truck and yelled for him to stop. The juvenile tried to walk around the officer, who was in plain clothes. The officer tried to grab the juvenile, who pushed the officer in the chest and ran home. The officer chased him, took custody of him on the front porch of the juvenile's house, and arrested him for loitering and prowling. The juvenile was found to have committed battery on a law enforcement officer because he pushed the officer. At trial the State abandoned a charge of resisting an officer with violence. The State took no action on the charge of loitering and prowling. The Third District Court of Appeal found that one of the elements of battery on a law enforcement officer is that the officer is engaged in the lawful performance of his or her duties. The State conceded that the act of looking inside the windows of the pickup, without more, is insufficient to establish the offense of loitering and prowling. The Third District concluded that the evidence was legally insufficient to support a determination that the juvenile committed battery on a law enforcement officer. There was neither probable cause, nor a founded suspicion, that the juvenile was committing the offense of loitering and prowling. Therefore, the officer was not engaged in the lawful performance of his duties when he stopped the juvenile. The Third District concluded that the evidence was legally insufficient and reversed. However, the evidence was sufficient to find the necessarily lesser included offense of misdemeanor battery under s. 784.03(1)(a)1, F.S. (2007). Accordingly, the case was remanded with instructions for the trial court to reduce the offense to simple battery. <http://www.3dca.flcourts.org/Opinions/3D08-0717.pdf> (April 8, 2009).

Fourth District Court of Appeal

H.L.G. v. State, ___ So.2d ___, 2009 WL 1139229 (Fla. 4th DCA 2009). **DISPOSITION REVERSED AND REMANDED FOR RECONSIDERATION IN ACCORDANCE WITH E.A.R. V. STATE, ___ SO.2D ___, 2009 WL 217979 (FLA. 2009)**. The Fourth District Court of Appeal granted rehearing, withdrew its June 11, 2008 opinion, and substituted this decision. The issue raised in this juvenile delinquency appeal was identical to the one raised in the recent decision in E.E. v. State, ___ So.2d ___, 2009 WL 605399 (Fla. 4th 2009). On the same basis, the Fourth District reversed the disposition under the authority of E.A.R. v. State, ___ So.2d ___, 2009 WL 217979 (Fla. 2009), and remanded with instructions to hold a new disposition hearing complying with E.A.R. . <http://www.4dca.org/opinions/Apr%202009/04-29-09/4D07-3585.op.pdf> (April 29, 2009).

B.M.S. v. State, ___ So.2d ___, 2009 WL 928525 (Fla. 4th DCA 2009). **FAILURE OF TRIAL COURT TO SPECIFY THE NUMBER OF DAYS OF PRECOMMITMENT CREDIT FOR A DETERMINANT SENTENCE WAS REVERSIBLE ERROR**. The juvenile was adjudicated delinquent of domestic battery, which carried a maximum sentence of one year for an adult. The juvenile was placed in a moderate-risk commitment for an indefinite period not longer than the child's 21st birthday or the maximum term of imprisonment an adult may serve. The court declared that the juvenile was entitled to credit for detention while awaiting placement, but left blank, in its order, the number of days that she should be credited. The juvenile filed a notice of appeal and submitted a motion to correct disposition. The juvenile argued that she was entitled to credit for the time period between her arrest and her commitment excluding the three days she absconded. The trial court never filed an order ruling on the motion and was deemed denied pursuant to Florida Rule of Juvenile Procedure 8.135(b)(2)(B) (2008). The juvenile appealed the denial. The issue was reviewed de novo. The Fourth District Court of Appeal found that the juvenile's sentence was a determinate commitment. Further, the Fourth District has found in other cases, that the failure to specify the number of days for a determinate sentence was reversible error. The Fourth District noted that under J.I.S. v. State, 930 So.2d 587, 591 (Fla.2006), the trial court's omission would not be reversible error. J.I.S. required the trial court to award credit for time served for determinate sentences, but not necessarily to specify the number of days. The Fourth District held that the Florida Supreme Court did not explicitly disapprove and the decision was not "in hopeless conflict" with the Fourth District's precedents. Therefore, the Fourth District reversed and remanded with directions for the trial court to calculate and specify the number of days the juvenile is to receive as credit for time served in secure detention. <http://www.4dca.org/opinions/Apr%202009/04-08-09/4D08-1782.op.pdf> (April 8, 2009).

Fifth District Court of Appeal

D.P. v. State, ___ So.2d ___, 2009 WL 1097264 (Fla. 5th DCA 2009). **FIREARM POSSESSION ALREADY FACTORED INTO THE INITIAL SCORING COULD NOT BE USED AGAIN WITHOUT IMPERMISSIBLY DOUBLE SCORING ON THE RISK ASSESSMENT INSTRUMENT**. Juvenile filed petition for writ of habeas corpus challenging his continued secure detention, based upon an

allegedly improperly scored RAI. The juvenile was charged with the offense of carrying a concealed firearm. Under section three of the RAI, he was given ten points for a third-degree felony involving the use and possession of a firearm. He was also scored an additional three points under that same section for the aggravating circumstance of illegal possession of a firearm. This resulted in a score exceeding the twelve points necessary for secure detention. The Fifth District Court of Appeal found that because the firearm possession was already factored into the initial scoring of ten points, it could not be used again without impermissibly double scoring the same conduct already accounted for in the RAI. Consequently, the juvenile was ineligible for secure detention because he scored less than twelve points. The petition for habeas corpus was granted.

<http://www.5dca.org/Opinions/Opin2009/042009/5D09-839.op..pdf> (April 20, 2009).

Dependency Case Law

Florida Supreme Court

No new opinions for this reporting period.

First District Court of Appeal

No new opinions for this reporting period.

Second District Court of Appeal

T.F. v. Department of Children and Family Services and Guardian ad Litem Program, ___ So. 3d ___, 2009 WL 1139239 (Fla. 2nd DCA 2009).

DEPENDENCY ADJUDICATION REVERSED

The mother appealed the adjudication of her child as dependent. The dependency petition had alleged that the mother was incarcerated and the mother consented to the petition at the arraignment hearing. The trial court approved the mother's request to waive her appearance at the disposition hearing so that the mother would not miss gain time. The mother's request was premised on the fact that the case plan goal was reunification of the child with the mother. The child was adjudicated dependent based on the mother's consent. The case plan had a reunification goal and an expiration date of October 5, 2008. At the disposition hearing, held February 1, 2008, the court questioned the reunification case plan when the mother would be incarcerated until 2009. The court *sua sponte* changed the goal from reunification to adoption with a concurrent goal of permanent guardianship. Later the trial court ordered the Department to file a petition for termination of parental rights. The Department and Guardian ad Litem conceded the error changing the goal at the disposition hearing but argued that the issue was moot because the mother subsequently surrendered her parental rights to the child. On appeal, the court rejected that argument because the mother had filed a motion to withdraw her written surrenders. The court noted that the trial court had orally denied the mother's motion but had not yet issued a written order and therefore the mother's time to appeal the order had not yet expired. If the mother were to appeal and if her consent to surrender her rights was reversed on appeal, the mother's current appeal would be relevant. Therefore, the court denied that the issue was moot and proceeded to the merits of the

mother's argument. The court noted that section 39.621(2)(b), Florida Statutes permits adoption only if a petition for termination of parental rights has or will be filed. The Department and Guardian ad Litem conceded error because such a petition was never filed and the Department had no intention of filing a petition for termination of parental rights. Therefore the trial court abused its discretion by changing the goal and ordering the Department to file a termination of parental rights petition. The court also noted that the trial court's decision to change the case plan goal meant that the mother's previous consent to dependency adjudication was not knowing and voluntary. The trial court neither obtained the mother's knowing and voluntary consent at a new arraignment hearing nor did it hold a dependency adjudicatory hearing. The court reversed the adjudication and remanded the case for further proceedings.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2009/April/April%2029,%202009/2D08-1291.pdf (April 29, 2009).

J.R. v. Department of Children and Family Services and Guardian ad Litem Program,
___ So. 3d ___, 2009 WL 1025761, 34 Fla.L.Weekly D790 (Fla. 2nd DCA 2009).

TERMINATION OF PARENTAL RIGHTS REVERSED

The father appealed termination of his parental rights based on abandonment. The child had originally been removed from the mother and the father's location was not known. The father's whereabouts had been various listed as unknown, Mexico, and "not been located through diligent search." The father was eventually located in New Jersey prison and not due to be released for seven or eight more years. After being contacted by the Department, the father sent letters and pictures to his child. The Department did not offer the father a case plan and instead sought to terminate his parental rights based on abandonment. On appeal, the court reviewed the statute and caselaw on abandonment and found that the Department failed to present clear and convincing evidence of abandonment. Instead, the evidence showed that the father communicated with his child as soon as he was informed of the dependency proceeding. Furthermore, the father was not given a case plan and was never given the opportunity to show that he intended to assume parental responsibilities during his incarceration. The Department had conceded error in the case. In reversing the order, the court ordered if termination of parental rights was pursued, the trial court must thoroughly address the child's best interest.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2009/April/April%2017,%202009/2D08-2554.pdf (April 17, 2009).

S.R.L. v. Department of Children and Family Services and Guardian ad Litem Program,
___ So. 3d ___, 2009 WL 1025809, 34 Fla.L.Weekly D790 (Fla. 2nd DCA 2009).

(No. 2D08-2663) **TERMINATION OF PARENTAL RIGHTS REVERSED**

The mother appealed termination of her parental rights and the Department and Guardian ad Litem conceded error due to the trial court's failure to provide counsel for the mother, who was indigent. The court reversed the order terminating the mother's parental rights but ordered that custody of the children not be changed due to the appellate opinion.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2009/April/April%2017,%202009/2D08-2663.pdf (April 17, 2009).

C.V., M.P., and B.P. v. Department of Children and Family Services and Guardian ad Litem Program, ___ So. 3d ___, 2009 WL 996820, 34 Fla.L.Weekly D753 (Fla. 2nd DCA 2009).

APPELLATE PROCEEDING DISMISSED

The court of appeal dismissed the appellate proceedings because it concluded that it had no appellate jurisdiction over the non-final order at issue and also had no basis to grant relief as a matter of certiorari. The trial court had entered an “Order Approving Status Review, Order Denying Placement Of Child (with paternal grandfather and step-grandmother) and Order Denying Mother’s Motion for Visitation.” Both the father and paternal grandparents had appealed the order. The court discussed at length the reviewability of the order in question. The court followed prior precedent holding that grandparents are not parties and are without standing to appeal. Although the court acknowledged the possibility that a grandparent would have sufficient rights to petition for certiorari if a trial court departed from the essential requirements of the law as to those rights, no such departure was alleged in the instant case. The court noted that the case involved a post-disposition change of custody under section 39.522, Florida Statutes and that the grandparents could not demonstrate that any interested party petitioned to change custody under that statute. Thus, the court dismissed the appeal as to the grandparents. The court next considered the father’s appeal but concluded that it did not have jurisdiction to review a non-final order in a dependency proceeding that declined to change the current placement of the child. The court therefore limited its review to that provided by common law certiorari. After further discussion of appealability and what constitutes a final order for appellate purposes, the court held that orders in dependency proceedings entered after entry of the order adjudicating dependency and before an order terminating supervision or jurisdiction are not appealable under Rule 9.130(a)(4). The court concluded by noting that the father had not suggested that certiorari would provide a possible remedy and therefore dismissed the father’s appeal.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2009/April/April%2015,%202009/2D08-3616.pdf (April 15, 2009).

M.D. v. Department of Children and Family Services and Guardian ad Litem Program, ___ So. 3d ___, 2009 WL 996844, 34 Fla.L.Weekly D760 (Fla. 2nd DCA 2009).

TERMINATION OF PARENTAL RIGHTS REVERSED

The court reversed an order terminating the mother’s parental rights because the trial court neither appointed counsel when termination of parental rights was an issue nor did it advise the mother of her right to counsel or obtain a waiver of counsel on the record. The Department and Guardian ad Litem conceded error.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2009/April/April%2015,%202009/2D08-2661.pdf (April 15, 2009).

M.M. v. Department of Children and Family Services and Guardian ad Litem Program, ___ So. 3d ___, 2009 WL 901635 (Fla. 2nd DCA 2009).

PERMANENT GUARDIANSHIP REVERSED

The court reversed placement of the father’s child in a permanent guardianship with protective supervision terminated. The Department and Guardian ad Litem had conceded that the trial court had erred and that even if the trial court had made the written findings required by

section 39.6221(2)(a), Florida Statutes, placement of the child in permanent guardianship was not supported by competent, substantial evidence. Therefore, the court reversed the order of permanent guardianship and remanded the case for reunification of the child with the father. http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2009/April/April%2003,%202009/2D08-1719.pdf (April 3, 2009).

Third District Court of Appeal

R.S. v. Department of Children and Family Services, ___ So. 3d ___, 2009 WL 928495, 34 Fla.L.Weekly D729 (Fla. 3rd DCA 2009).

TERMINATION OF PARENTAL RIGHTS AFFIRMED

The mother appealed termination of her parental rights to her two children. The issue on appeal was whether there was substantial competent evidence supporting the trial court's decision. The children were removed twice. After the first removal, the mother consented to dependency and was given a case plan. After the mother complied with the case plan, the children were reunified with her. Four months later, one of the children, M.L., was returned to shelter care after stabbing the mother with a knife. A little more than four months after that, the other child, C.A., was sheltered because the mother had been evicted from her home, had not secured alternate housing, did not notify the Department as to her and her child's whereabouts (as required by court order), and the child had thirty-seven absences from school. On appeal, the court noted that the mother had not sought contact with M.L. between the date of the stabbing and the termination proceeding even though the Department offered to arrange therapeutic visitation for eventual reunification. With respect to C.A., the mother attended only two visitations, which caused the trial court to terminate visitation and enter a no contact between the mother and the children. The trial court had concluded that the Department had proven by clear and convincing evidence that the mother had abandoned both children within the meaning of the sections 39.01 and 39.806(1)(b), Florida Statutes. Although there was conflicting evidence, there was competent substantial evidence supporting the order terminating parental rights and the court therefore affirmed the order. <http://www.3dca.flcourts.org/Opinions/3D08-0701.pdf> (April 8, 2009).

Fourth District Court of Appeal

T.G. v. Department of Children and Families, ___ So. 3d ___, 2009 WL 1066066 (Fla. 4th DCA 2009). **TERMINATION OF PARENTAL RIGHTS AFFIRMED**

The court affirmed termination of the mother's rights based on abandonment. The court noted that over a nearly ten-year period when the children were under protective supervision, the mother visited the children sporadically and stopped visiting altogether on a date that was a year before the start of the adjudicatory hearing. The court reviewed the statutory definition of abandonment and the caselaw and it also noted that although the record contained conflicting testimony about the mother's difficulties in arranging visits, it could not reweigh the testimony and evidence or substitute its judgment for that of the trial judge. <http://www.4dca.org/opinions/Apr%202009/04-22-09/4D08-2198.op.pdf> (April 22, 2009).

C.M. v. Department of Children and Families, ___ So. 3d ____, 2009 WL 996410, 34 Fla.L.Weekly D777 (Fla. 4th DCA 2009).

ADJUDICATION OF DEPENDENCY REVERSED

The court reversed an adjudication of dependency based on the child's presence during an incident of domestic violence. On appeal, the court noted that the evidence of the child's presence of minimal and the finding that the child suffered mental harm was not supported by competent substantial evidence. The only evidence of harm was from hearsay testimony. <http://www.4dca.org/opinions/Apr%202009/04-15-09/4D08-3929.op.pdf> (April 15, 2009).

M.S. v. Department of Children and Families, ___ So. 3d ____, 2009 WL 838285, 34 Fla.L.Weekly D679 (Fla. 4th DCA 2009).

DEPENDENCY ADJUDICATION REVERSED BECAUSE OUT-OF-STATE RECORDS CONTAINED HEARSAY AND WITNESS WAS IMPROPERLY PERMITTED TO TESTIFY BY TELEPHONE

The court reversed an adjudication of dependency that was based on improperly admitted hearsay and improperly permitted telephonic testimony. The child had been sheltered and was the subject of a dependency petition. The case was initiated mostly due to a history of inadequate care in Maryland. At the adjudicatory hearing, Maryland records were admitted over the father's objections that they contained hearsay and were unreliable. Furthermore, a social worker from Maryland was allowed to testify by telephone over the father's objection. The trial court relied in significant part on the Maryland records and testimony of the Maryland worker. On appeal, the court reviewed the caselaw and noted that the Maryland records were inadmissible as business records under section 90.803(6), Florida Statutes as the trial court had permitted. The records were similarly inadmissible as public records under section 90.803(8), Florida Statutes. The records that were admitted consisted mostly of inadmissible hearsay statements from unknown people in Maryland. With regard to the telephonic testimony, the court noted that Rule of Judicial Administration 2.530(d)(1) requires all parties to consent to testimony taken through communication equipment. The father did not consent and therefore the trial court erred in admitting the telephonic testimony. Finally, the court concluded that the trial court's errors were not harmless as the trial court had heavily relied on the improperly introduced evidence in making its ruling. The court reversed the adjudication and remanded the case for a new hearing.

<http://www.4dca.org/opinions/Apr%202009/04-01-09/4D08-3512.op.pdf> (April 1, 2009).

Fifth District Court of Appeal

C.A.T. v. Department of Children and Families, ___ So. 3d ____, 2009 WL 1159192 (Fla. 5th DCA 2009). **TERMINATION OF PARENTAL RIGHTS REVERSED**

The court reviewed an appeal by a father of an order terminating his parental rights. The father argued that the abandonment statute was unconstitutionally vague; that termination of his parental rights was not the least restrictive means of protecting the child; and that the termination decision was not supported by the record. On appeal, the court noted that it had previously rejected a similar vagueness challenge to the abandonment statute and therefore declined to address the father's argument on that point. Next the court noted that resolution

of the second issue would render the third issue moot. The court reviewed the caselaw regarding the least restrictive means that noted that in order terminate parental rights, the Department must prove in addition to the statutory requirements that termination is the least restrictive means of protecting the child. The court noted that the Supreme Court held in Padgett v. Department of Health and Rehabilitative Services, 577 So. 2d 565 (Fla. 1991), that this ordinarily requires that the Department make a good faith effort to rehabilitate the parent and reunite the family through a performance agreement or other plan. In this case, the father was not offered a plan prior to initiation of termination proceedings. The court noted that the father had been found to be non-offending in 2006 in a previous case involving the child. Although the father was ordered to submit to a substance abuse evaluation, which was referred to as a case plan, it was not in fact a case plan for reunification with the father. Furthermore, the father had not received Department services since his original case plan in 2002 and was never offered a case plan with services as an alternative to the instant termination proceedings. The court concluded that the Department failed to prove by clear and convincing evidence that termination of the father's parental rights was the least restrictive means of protecting the child from harm. The court reversed the termination of the father's rights and remanded the case for further proceedings.

<http://www.5dca.org/Opinions/Opin2009/042709/5D08-2350.op.pdf> (April 29, 2009).

J.W.B. v. Department of Children and Families, ___ So. 3d ____, 2009 WL 1024588, 34 Fla.L.Weekly D784 (Fla. 5th DCA 2009). **TERMINATION PARENTAL RIGHTS AFFIRMED**

The court affirmed termination of the father's parental rights. The father has been incarcerated since the child's birth, has never seen her, has not had contact with the child, and has not provided any financial support. The Department filed its petition for termination of parental rights on October 18, 2007, when the child was approximately sixteen months old. The child would be approximately twelve years old at the time of the father's release from incarceration. The court analyzed the Supreme Court's decision in B.C. v. Department of Children and Families, 87 So. 2d 1046 (Fla. 2004) and noted that section 39.806(1)(d)1, Florida Statutes is prospective and looks at the time for which the parent is expected to be incarcerated in the future. The court concluded that the sixty percent of the child's life that would occur with the father incarcerated constituted a "substantial portion" of the child's life before reaching eighteen years of age. The court affirmed termination of parental rights.

<http://www.5dca.org/Opinions/Opin2009/041309/5D08-2900.op.pdf> (April 16, 2009).

Dissolution Case Law

Florida Supreme Court

No new opinions for this reporting period.

First District Court of Appeal

Stough v. Stough, __ So. 2d __, 2009 WL 109837, (Fla. 1st DCA 2009).

REAL PROPERTY PURCHASED WITH FUNDS FROM JOINT ACCOUNT IS MARITAL ASSET

Former husband had appealed previous order issued by the trial court arguing that the circumstances did not support the unequal distribution of marital assets and that the factual findings failed to support his alimony award. In Stough v. Stough, 933 So. 2d 603 (Fla. 1st DCA 2006), the appellate court had found that the trial court's reasoning that former wife should be awarded property located in Alabama because it had been purchased with funds from a trust established for her by her father, was faulty because former wife had deposited those funds into a joint checking account which had been used for living expenses throughout the 19 year marriage. In that appeal, the appellate court had held that this commingling created a rebuttable presumption that former wife intended one-half of the trust funds to be gifted to former husband and that she had failed to rebut the presumption; the case was remanded. On remand, the trial court again awarded the marital assets unequally. The appellate court did not take kindly to this, commenting, "Despite our holding, the trial court has fashioned an alternate way to give the wife full credit for the trust account funds by unequally distributing the parties' assets, which it cannot do." Concluding that none of the factors articulated by the trial court supported its unequal distribution, the appellate court held that to affirm the trial court's ruling would give to trial courts discretion to unequally distribute assets based solely on one spouse's greater financial contribution. The appellate court then stated that it was going to "decline to reach this bizarre result." The appellate court also found that the trial court had erred in its imputation of income to former husband. <http://opinions.1dca.org/written/opinions2009/04-24-2009/07-6367.pdf> (April 24, 2009).

Syverson v. Jones, __ So.2d __, 2009 WL 1098938, (Fla. 1st DCA 2009).

REAL PROPERTY HELD BY TENANTS IN THE ENTIRETIES PRESUMED TO BE MARITAL ASSET

Former wife sought review of partial and supplemental final order of dissolution of marriage on multiple grounds; appellate court reversed trial court's ruling that the prenuptial agreement contained latent ambiguities and its award to former husband of various credits pertaining to the marital home during former wife's exclusive use of it. Commenting that findings regarding latent ambiguities are reviewed de novo, the appellate court reached a different conclusion regarding those ambiguities. With regard to the award to former husband concerning the marital home, appellate court reiterated that real property held by former spouses as tenants in the entireties is presumed to be a marital asset and that the burden of proof is on the spouse making a claim to the contrary. Section 61.075(5)(a)5, Florida Statutes.

<http://opinions.1dca.org/written/opinions2009/04-24-2009/08-0859.pdf> (April 24, 2009).

Valdes v. Valdes, __ So. 2d __, 2009 WL 1035004, (Fla. 1st DCA 2009).

TRIAL COURT MUST ARTICULATE FINDINGS RE ACTUAL OR ADJUSTED INCOME OF PARTIES

In an appeal by former wife to final judgment of dissolution, appellate court reversed and remanded as to child support award, holding that where a trial court fails to articulate findings regarding the actual or adjusted income of the parties, the appellate court cannot determine whether a child support award is within the guidelines.

<http://opinions.1dca.org/written/opinions2009/04-20-2009/08-3887.pdf> (April 20, 2009).

Robinson v. Robinson, __ So. 2d __, 2009 WL 981240, (Fla. 1st DCA 2009).

ASSETS ACQUIRED PRIOR TO MARRIAGE ARE NONMARITAL

Former husband appealed final judgment of dissolution of marriage arguing that trial court had erred in treating as marital property five shares of stock he had acquired prior to the marriage. Appellate court agreed with him, reiterating that assets acquired prior to marriage are nonmarital and must be set aside to the owner spouse. The appellate court noted that there was no evidence of commingling, enhancement, or gift of the stock to former wife and held that the fact that former husband derived his income from his position with a closely held family-owned corporation from which he had acquired the stock did not transform it into a marital asset.

<http://opinions.1dca.org/written/opinions2009/04-14-2009/07-5841.pdf> (April 14, 2009).

Second District Court of Appeal

Cox v. Cox, __ So. 2d __, 2009 WL 875607, (Fla. 2nd DCA 2009).

FAILURE TO RAISE ISSUE BELOW RESULTS IN FAILURE TO PRESERVE; DOUBLE-COUNTING IS ERROR; ALIMONY IS DETERMINED BEFORE CHILD SUPPORT

Former husband appealed portions of dissolution judgment relating to equitable distribution and permanent alimony. Appellate court held that by failing to raise in the trial court the issue of whether federal law prohibits Social Security disability benefits from being classified as a marital asset, former husband had failed to preserve the issue for appeal. The appellate court did not find reversible error in the trial court having failed to include former wife's income tax refund as a marital asset; however, it did find that the trial court had erred in double-counting a child's expenses by using them in calculating alimony and child support. The appellate court noted that alimony is determined before child support.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2009/April/April%2003,%202009/2D07-2697.pdf (April 3, 2009).

Third District Court of Appeal

Quincozes v. Quincozes, __ So 2d __, 2009 WL 928491, (Fla. 3rd DCA, April 8, 2009)(NO. 3D08-0196)

WHEN TRIAL COURT IS FINDER OF FACT, ABUSE OF DISCRETION IS STANDARD FOR REVIEW

Former wife appealed trial court's order denying her motion for contempt stemming from former husband owing both child support and proceeds from sale of the marital home. Although the trial court found that former husband did owe former wife, it concluded that his conduct, under the circumstances, did not constitute contempt. Appellate court held that because there was competent, substantial evidence to support the trial court's determination that former husband received neither adequate notice nor sufficient opportunity to present his case, the trial court did not err by remanding case to magistrate in order to provide him with a fair opportunity to do so. Appellate court noted that when the trial court serves as the finder of fact, as it did in this case when the magistrate rescued herself on remand, that the standard of review is abuse of discretion. <http://www.3dca.flcourts.org/Opinions/3D08-0196.pdf> (April 8, 2009).

Lawrence v. Peyton, __ So. 2d __, 2009 WL 928527, (Fla. 3rd DCA, April 8, 2009)(NO. 3D08-1665)
CHILDREN SHOULD NOT BE 'PLAYED' AS IN A GAME OF PING-PONG

In what the appellate court termed an, “excessively litigated, post-dissolution proceeding,” former husband appealed portion of the trial court’s order pertaining to where the former couple’s then six year old son would spend his summer. The appellate court quoted Perez v. Perez, 769 So. 2d 389.392 (Fla. 3rd DCA 1999), “Children should not be ‘played’ as if in a game of ping-pong where the parent with the greater resources to serve the greatest number of motions wins.”

<http://www.3dca.flcourts.org/Opinions/3D08-1665.pdf> (April 8, 2009).

Fourth District Court of Appeal

Segnini v. Segnini, __ So. 2d __, 2009 WL 928489, (Fla. 4th DCA, April 8, 2009)(NO. 4D08-1314)
TRIAL COURT MUST USE SECTION 61.30(2)(a)3, FLORIDA STATUTES, IN DETERMINING GROSS INCOME

Former husband appealed order modifying child support, arguing that an error in the trial court’s calculation of his income caused an error in calculation of child support. Appellate court found that trial court had misapplied section 61.30(2)(a)3, Florida Statutes, in determining former husband’s gross monthly income; accordingly, it reversed and remanded.

<http://www.4dca.org/opinions/Apr%202009/04-08-09/4D08-1314.op.pdf> (April 8, 2009).

Bon v. Rivera, __ So. 2d __, 2009 WL 928612, (Fla. 4th DCA, April 8, 2009)(NO. 4D08-4105)
STANDARD OF REVIEW FOR TRIAL COURT IN MODIFYING CUSTODY IS ABUSE OF DISCRETION

Former wife appealed order granting former husband’s emergency motion for temporary change in custody; appellate court reversed due to former husband’s failure to allege and trial court’s failure to find, a substantial change in circumstances. In doing so, appellate court stated that the standard for reviewing a trial court’s ruling on modification of custody is abuse of discretion; however, the court noted that a trial court has much less discretion when it modifies a custody order than when it initially determines custody. Although no evidence of a true emergency was presented in the case, the appellate court pointed out that when such evidence does exist, that the trial court may enter an order temporarily modifying custody without giving prior notice to the other parent.

<http://www.4dca.org/opinions/Apr%202009/04-08-09/4D08-4105.op.pdf> (April 8, 2009).

Jalileyan v. Jalileyan, __ So. 2d __, 2009 WL 838258, (Fla. 4th DCA, April 1, 2009)(NO. 4D07-3882)
UNEQUAL DISTRIBUTION REQUIRES EXPLANATION AND JUSTIFICATION BY TRIAL COURT

Former husband appealed final judgment of dissolution of marriage, arguing that trial court erred in its distribution of the marital assets; appellate court reversed due to trial court having make an unequal distribution of marital assets without having made factual findings to either explain or justify the disproportionate equitable distribution.

<http://www.4dca.org/opinions/Apr%202009/04-01-09/4D07-3882.op.pdf> (April 1, 2009).

Fifth District Court of Appeal

Arcot v. Balaraman, ___ So. 2d ___, 2009 WL 935976, (Fla. 5th DCA 2009).

TRIAL COURT MUST USE ACTUAL INCOME, NOT ESTIMATED, IN CALCULATING CHILD SUPPORT

Both former spouses appealed amended final judgment of dissolution of marriage on numerous grounds; appellate court found several errors requiring correction. Appellate court found, inter alia, that trial court had erred when it relied on former wife's estimated income in calculating the retroactive child support; accordingly, it instructed the trial court on remand to determine the actual income earned by former spouses during the time of the arrearage and rely on those figures in calculating the child support.

<http://www.5dca.org/Opinions/Opin2009/040609/5D07-1989.op.pdf> (April 6, 2009).

Domestic Violence Case Law

Florida Supreme Court

No new opinions for this reporting period.

First District Court of Appeal

Sermon v. State, --- So.3d ----, 2009 WL 1153258 (Fla. 1st DCA 2009). **CRIMINAL SENTENCING** A prison releasee re-offender was sentenced to life pursuant to §775.082, Florida Statutes, after committing a burglary and assault and battery while committing a burglary, which is a first degree felony. He had previously been sentenced for violating a domestic violence injunction, simple assault and simple battery. The court upheld the life sentence, but questioned how carefully the Legislature thought through all the ramifications of the minimum mandatory sentences it prescribed for prison releasee re-offenders.

<http://opinions.1dca.org/written/opinions2009/04-30-2009/08-1167.pdf> (April 30, 2009).

Second District Court of Appeal

No new opinions for this reporting period.

Third District Court of Appeal

No new opinions for this reporting period.

Fourth District Court of Appeal

C.M. v. Department of Children and Families, --- So.3d ----, 2009 WL 996410 (Fla. 4th DCA 2009). **DEPENDENCY ADJUDICATION REVERSED** The father appealed an order adjudicating his 7 year old child dependent. The court reversed because the adjudication was based upon a finding that the child suffered mental harm as a result of witnessing a domestic violence incident, however, the court found that this finding was not supported by competent substantial evidence. The only evidence of harm to the child came from a child advocate's hearsay testimony. <http://www.4dca.org/opinions/Apr%202009/04-15-09/4D08-3929.op.pdf> (April 15, 2009).

Fifth District Court of Appeal

No new opinions for this reporting period.